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## Introduction to the Colloquium on LGBTI Rights

*Holning Lau*<sup>†</sup>

Lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights have advanced markedly at the international level.<sup>1</sup> Twenty-five years ago, the United Nations (U.N.) Human Rights Committee broke ground by concluding in *Toonen v. Australia* that Tasmania's antigay sodomy law violated privacy and equality rights enshrined in the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> *Toonen* was a landmark development because never before had a U.N. treaty body stated so unequivocally that sexual orientation rights are human rights.<sup>3</sup> In the two-and-a-half decades since *Toonen*, various parts of the U.N. have built upon the foundation that *Toonen* laid.

Indeed, it is now commonplace for U.N. treaty bodies to speak out in favor of LGBTI rights.<sup>4</sup> Other parts of the United Nations have also taken strides to advance LGBTI rights. For example, in

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<sup>1</sup> To be sure, the rights of various subgroups under the LGBTI umbrella have not advanced at the same pace. For example, the development of intersex rights is relatively nascent. In this writing, I will sometimes use the acronym "LGBT" instead of "LGBTI" when discussing situations in which LGBT rights were addressed but intersex rights were not.

<sup>2</sup> The U.N. Human Rights Committee held that Tasmania's sodomy law violated the ICCPR's protection of privacy in Article 17(1), in conjunction with the protection of equality in Article 2(1). *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994), ¶ 10. The Committee also stated that the prohibition of sex discrimination in Article 26 encompasses the prohibition of sexual orientation discrimination, but the Committee did not base its decision on Article 26. *Id.* at ¶¶ 8.7, 11.

<sup>3</sup> See, e.g., Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 69 (1996).

<sup>4</sup> See International Commission of Jurists, *SOGI U.N. Database*, <https://www.icj.org/sogi-un-database/> [<https://perma.cc/P3PS-UFJK>] (compiling treaty body statements concerning sexual orientation and gender identity rights); STOPIGM.ORG, *40 U.N. Reprimands for Intersex Genital Mutilations – and Counting . . .*, <http://stop.genitalmutilation.org/post/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilations> [<https://perma.cc/96CQ-Y57H>] (compiling information about treaty body statements criticizing the violation of intersex children's human rights).

2013, the Office of the High Commissioner for Human Rights launched its “Free & Equal Campaign,” which focuses on cultivating LGBTI rights.<sup>5</sup> In 2016, the U.N. Human Rights Council decided to appoint its first-ever Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>6</sup> Seven U.N. agencies, including the World Health Organization, have also collaborated to condemn sterilization surgeries imposed on intersex and transgender persons.<sup>7</sup>

Beyond the United Nations, a distinguished group of international human rights experts adopted the Yogyakarta Principles in 2006.<sup>8</sup> The Yogyakarta Principles outlined the ways in which international human rights law protects people in matters concerning sexual orientation and gender identity. The Yogyakarta Principles are often regarded as persuasive authority and have been cited by numerous international organizations and national tribunals.<sup>9</sup> In 2017, international human rights experts updated the Yogyakarta Principles by issuing the Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (also known as the “Yogyakarta Principles Plus Ten” and “YP+10”).<sup>10</sup>

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<sup>5</sup> See U.N. Unveils ‘Free & Equal’ Campaign to Promote Lesbian, Gay, Bisexual, Transgender Rights, U.N. NEWS (July 26, 2013), <https://news.un.org/en/story/2013/07/445552-un-unveils-free-equal-campaign-promote-lesbian-gay-bisexual-transgender-rights> [https://perma.cc/RJN4-NTPL]. Although the Free & Equal Campaign did not originally address intersex rights, it eventually expanded to cover intersex rights.

<sup>6</sup> See Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (June 30, 2016).

<sup>7</sup> See WORLD HEALTH ORGANIZATION ET AL., ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT, OHCHR, U.N. WOMEN, UNAIDS, UNDP, UNFPA, UNICEF AND WHO (2014), available at [https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf) [https://perma.cc/5G8M-NNML].

<sup>8</sup> The Yogyakarta Principles are available at *The Yogyakarta Principles*, <http://www.yogyakartaprinciples.org>.

<sup>9</sup> See generally Andrew Park, *Yogyakarta plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223 (2019) (discussing the creation and impact of the Yogyakarta Principles).

<sup>10</sup> See *The Yogyakarta Principles*, supra note 8 (providing background on, and a

In light of these developments, as well as related developments in regional and domestic human rights law, the *North Carolina Journal of International Law* decided to devote this “colloquium issue” of the journal to the topic of LGBTI human rights. The colloquium begins with an article by Andrew Park, who participated in the development of both the Yogyakarta Principles and the YP+10. Park’s article sheds light on various factors that have contributed to the Yogyakarta Principles’ success in advancing LGBTI rights.<sup>11</sup> His article also comments on ways in which he believes the YP+10 improved upon the original Yogyakarta Principles, as well as ways the YP+10 falls short.<sup>12</sup>

Next, Kelley Loper’s article provides a case study on the relationship between international and local developments.<sup>13</sup> Her article focuses on Hong Kong.<sup>14</sup> Hong Kong courts have advanced LGBT rights over a series of cases.<sup>15</sup> In these cases, the courts have cited international and comparative human rights law, including developments at the U.N. Human Rights Committee and the European Court of Human Rights (ECtHR).<sup>16</sup> Loper argues that, through LGBT rights cases, Hong Kong courts have begun to develop a robust doctrine of substantive equality.<sup>17</sup> Going forward, Hong Kong courts will have the opportunity to build on their existing jurisprudence on substantive equality and, in doing so, Hong Kong may surpass the U.N. Human Rights Committee and the ECtHR in protecting LGBT rights.<sup>18</sup> Hong Kong provides an illuminating case study on how domestic courts can productively engage international and comparative law on LGBT rights.

The final two articles focus on the advancement of LGBT rights at the Inter-American Court of Human Rights (IACtHR).<sup>19</sup> In

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weblink to, the YP+10).

<sup>11</sup> Park, *supra* note 9, at 228–42.

<sup>12</sup> *Id.* at 243–47.

<sup>13</sup> See Kelley Loper, *International Human Rights Law, Substantive Equality, and Prospects for LGBT Rights Claims in Hong Kong*, 44 N.C. J. INT’L L. 273 (2019).

<sup>14</sup> *Id.* at 273–74.

<sup>15</sup> *Id.* at 274.

<sup>16</sup> *Id.* at 280–87.

<sup>17</sup> *Id.* at 297–308.

<sup>18</sup> *Id.* at 308–15.

<sup>19</sup> See Macarena Saez, *In the Right Direction: Family Diversity in the Inter-American system of Human Rights*, 44 N.C. J. INT’L L. 317 (2019); Jorge Contesse, *Sexual Orientation and Gender Identity in Inter-American Human Rights Law*, 44 N.C. J. INT’L

addition to citing Inter-American law and legal developments within Latin American countries, the IACtHR has also cited U.N. treaty bodies, the Yogyakarta Principles, the YP+10, and the ECtHR in its LGBT rights cases.<sup>20</sup> In important ways, the IACtHR's LGBT rights jurisprudence goes farther than that of U.N. treaty bodies and the ECtHR. For example, the IACtHR is the only international body thus far to recognize same-sex marriage as a human right.<sup>21</sup> The IACtHR has also gone farther than the ECtHR in protecting transgender persons' right to legal gender recognition.<sup>22</sup>

Professor Macarena Saez' and Jorge Contesse's articles examine the strengths and weaknesses of the IACtHR's LGBT rights jurisprudence.<sup>23</sup> Both authors commend the IACtHR for advancing LGBT rights.<sup>24</sup> Still, Saez' article expresses concerns that the IACtHR's advisory opinion on same-sex marriage risks reinforcing marriage's privileged position in harmful ways.<sup>25</sup> She explains that, in the future, it will be important for the IACtHR to protect the rights of families that are not organized around marriage, such as single-parent households and de facto couples.<sup>26</sup> Finally,

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L. 353 (2019).

<sup>20</sup> See, e.g., State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, In Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), nn.45, 49, 177, 240, 244, 245 [hereinafter *Advisory Opinion OC-24/17*]; Contesse, *supra* note 19, at 355–79.

<sup>21</sup> *Advisory Opinion OC-24/17*, *supra* note 20, at ¶ 189. See also Holning Lau, *Sexual Orientation and Gender Identity Discrimination*, 2(2) COMP. DISCRIMINATION L. 1, 33 (2018) (explaining that the IACtHR challenges the conventional narrative that LGBT rights originate in the West and Global North, and then are exported to the rest of the world).

<sup>22</sup> See Holning Lau, *Gender Recognition as a Human Right*, in THE CAMBRIDGE HANDBOOK ON NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 13–14 (A. von Arnould, K. von der Decken & M. Susi eds., forthcoming 2018) (comparing the IACtHR's and ECtHR's cases on legal gender recognition).

<sup>23</sup> See Saez, *supra* note 19; Contesse, *supra* note 19.

<sup>24</sup> See Saez, *supra* note 19, at 335–50; Contesse, *supra* note 19, at 382.

<sup>25</sup> See Saez, *supra* note 19, at 347–50. For a related discussion on similar concerns about *Obergefell v. Hodges*, the United States Supreme Court's landmark same-sex marriage decision, see Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 FORDHAM L. REV. 2615, 2616–21 (2017).

<sup>26</sup> See Saez, *supra* note 19, at 351.

Contesse's article draws attention to the backlash against the IACtHR that was provoked by its advisory opinion.<sup>27</sup> His article urges scholars, lawyers, and judges of the IACtHR to think carefully about developing ways to contain the growing resistance to the IACtHR.<sup>28</sup>

Together, the articles from this colloquium issue provide fresh insights into the development of LGBTI human rights. They help readers better understand how the protection of LGBTI rights has grown. They illuminate potential paths forward for the further development of LGBTI rights, while also drawing attention to obstacles that stand in those paths.

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<sup>27</sup> See Contesse, *supra* note 19, at 382–83.

<sup>28</sup> See *id.* at 383–84.

